IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

THE SHAWNEE SEWERAGE AND DRAINAGE COMPANY,
Appellant,

vs.

FRANK P. STEARNS, AS MAYOR OF THE CITY OF SHAWNEE, ET AL.,
Appellees.

No. 109.

BRIEF OF APPELLANT.

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STATEMENT OF FACTS.

This is an appeal from the Circuit Court of the United States for the Western District of Oklahoma, from a decree entered on October 19, 1908, dissolving a temporary injunction theretofore granted in this cause, and sustaining the appellees' demurrer to the appellant's bill and amendment thereto.

The suit was originally commenced on the 20th day of July, 1908 in the aforesaid circuit court, by

filing a bill in equity, which appears on pages 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the record. There was attached to the bill a number of exhibits, which appear on pages 11 to 29 inclusive, of the record. The appellant, the complainant below, alleged that it was a private corporation organized under the laws of the Territory of Oklahoma, and engaged in the business of constructing and operating a system of sewerage in the City of Shawnee, in the Western District of Oklahoma; that the defendants were the duly elected, qualified and acting mayor and council of the City of Shawnee, a municipal corporation. That on the 22d day of November, 1901, the defendant being a city of the first class, and being a corporation under and by virtue of the laws of the Territory of Oklahoma, and having authority in the premises, did by ordinance, grant to DeBruler, Newman & Company, their successors and assigns, the privilege to build and maintain, in the City of Shawnee, a system of sewerage, for a term of fifty years. A copy of the ordinance was attached to the bill and marked Exhibit "A" for identification, and will be found on pages 11, 12 and 13 of the record. And that thereafter, on the 28th day of February, 1902, the said council, by ordinance, amended the original ordinance, providing that the term of its existence should be for a period of twenty-one years, which amendment was evidenced by an ordinance duly passed, numbered 228, a copy of which was

marked Exhibit B and attached to the complainant's bill, and is found on pages 13 and 14 of the record.

This ordinance, amending the original one, was passed to conform to the requirements of the statutes of the Territory of Oklahoma, in regard to the time for which a franchise of this character could be granted, the law providing at that time, a maximum of twenty-one years as the period for which a franchise could run; and that thereafter, De Bruler, Newman & Company, for a valuable consideration, assigned and set over to the complainant, all of their rights, privileges and immunities properties and interest in and to the said sewer system granted to them under the provisions of the said ordinance, and that the city of Shawnee, by ordinance duly passed, which was numbered 242, ratified and confirmed the assignment and transfer of the rights and privileges granted to the said DeBruler, Newman & Company, to the complainant in this case, which assignment being duly ratified as aforesaid, did vest the appellant with the interest, title, rights, privileges and immunities of the said franchise, for the building, constructing, erecting and maintaining said sewer system in the City of Shawnee. A copy of said ordinance was attached to the complainant's bill, marked Exhibit C and made a part thereof, and will be found on pages 14 and 15 of the record.

The complainant further charged that by the terms of said ordinances, that the appellant agreed

to allow the use of its sewers for the city hall, jail, fire department and public watering trough, within the limits of the said city, free of charge to the said city, and that the city obligated and bound itself to furnish water to flush the said sewer, free of charge.

Complainant further charged that under and pursuant to said ordinances, and relying thereon, after giving the bond required thereby, and conditioned as by the said ordinances required, did commence and complete the construction of a system of sewerage in the City of Shawnee, and lay and extend mains and lateral sewers over and throughout the limits of the said city, and spent and invested in such extension the sum of Forty Thousand ($40,000.00) Dollars, and that under and pursuant to Ordinance No. 242 heretofore referred to, and which is found on pages 14 and 15 of the record, issued its bonds, secured by mortgage upon its property, in the sum of Twenty-Five Thousand ($25,000.00) Dollars, payable twenty-one years from the date of the same, and bearing interest at the rate of six per cent, and sold the same to various and divers innocent purchasers and holders thereof, who were, at the time of the institution of this suit, owrers of the said bonds. That it had allowed the city the use of the said sewer system, free of charge, for the city hall, jail, fire department, and watering trough, and connected the said sewe therewith, and that it performed its duties to the

city in

that regard and did in every way, comply with the conditions, duties and obligations imposed by the said ordinances, and was at that time, and had for a long time, prior thereto, maintained in the said City of Shawnee, a sewer system that was adequate to and met all the demands and necessities of the said City of Shawnee, for sewerage purposes (Rec. p. 4).

That the complainant was the owner of the said property which was regularly assessed, and that it paid the city, county and state taxes, and that the taxes imposed by the said city upon the property owners of the City of Shawnee, were extended to and charged against and collected from the complainant's property as their interests appear from time to time, and in the manner provided by law. That on or about the 1st day of December, 1901, that the city, in order to encourage the complainant to build the said sewer system in compliance with their ordinances, passed an ordinance providing that when the said sewer system should be extended, that all overground closets should be declared a public nuisance, and requiring all property owners adjacent to such system, to connect with the said sewer system, but that immediately after the complainant had invested a large sum of money in the construction of the said sewer, that the city repealed the said ordinance, and has habitually and systematically discouraged, and by divers means, attempted to impair the investment of your orator's property, and to take the same without paying any

compensation therefor, knowing that the complainant had relied upon the privileges and immunities granted by the said ordinances, in the making of the said investment. (See Rec. p. 5).

The bill charged that on or about the 5th day of October, 1906, the mayor of the City of Shawnee, issued a proclamation calling an election, and submitting to the voters the question of issuing bonds in the sum of Sixty-five Thousand ($65,000.00) Dollars, for the purpose of extending a water works system in the said city, and also for the building of a public sewer, and that at the said election, that the bond issue was carried, and the same was canvassed, and thereafter the mayor of the city duly issued a proclamation declaring that the said bonds had carried, but that on the 6th day of November, 1906, the complainant herein, instituted a suit in the District Court of the Third Judicial District of the Territory of Oklahoma, alleging and setting forth the ordinances heretofore referred to in this statement, charging that the complainant had expended large sums of money in the building and erection of the said sewer system; that they had constructed and were maintaining a main sewer, together with certain lateral sewers, in the City of Shawnee; that the said laterals were connected with the main sewer and were all a part of the said sewer system. (Rec. p. 56-7-8). That the complainant had constructed its sewers along the streets and alleys of the said city, following as near as prac-

ticable, the natural drainage of the said city, and did build laterals and connect with the closets of the private properties of the said city. That the defendant, in violation of the franchise and the contract entered into between it and the complainant, was commencing to, and unless enjoined, would erect its main sewer alongside of the main sewer of the complainant, and cause the citizens of the said city to connect with the public sewer, for the reason that as the city must build and maintain such system and no other, or further consideration would be required, and that the citizens whose property was connected with the complainant's system would be taxed to maintain the defendant's sewer, whether connected with it or not, would therefore be induced to connect with the said system of the defendant, and the property of the complainant being wholly underground, would be worthless and valueless, and would be totally destroyed and appropriated without due process of law, and without paying any compensation therefor. A copy of the petition, which complainant alleges was filed in the District Court of the Territory of Oklahoma, will be found on pages 21-2-3-4-5-6-7-8 and 29 of the record, and it will be found that this petition was filed on the 6th day of November, 1906.

We want to invite the court's attention to the fact that the petition in that case, which is found on pages 21 to 29 inclusive of the record, contains the same allegations and states the same propositions al-

most identically, word for word, as stated in the bill in equity filed by the complainant in this case. It will be observed that the parties are identically the same, except that the officers of the defendant city, in some respects, have been changed, but the suit was brought by this complainant against the mayor and councilmen of the City of Shawnee.

The complainant further alleges that thereafter, on the 22d day of December, 1906, the action filed in the Territorial court to enjoin the city from building its main sewer alongside of the main sewer of the complainant, was duly tried and a decree was duly rendered and given adjudging and decreeing that the complainant in this case had a legal and valid franchise from the defendant, and was authorized by the said franchise to carry on its business of operating said sewer system in the City of Shawnee, and that by the terms of the said franchise the defendant was excluded from constructing any sewer system, and the operation and construction of this sewer by the said city, in the immediate vicinity of the complainant's sewer, would confiscate the plaintiff's property, and would depreciate the value of the bonds thereon, and that the complainant had the exclusive right against said city, and further alleges that by the terms of the decree, the defendants were enjoined from building and operating a sewer system in the vicinity of the complainant's sewer, until after it should be condemned or purchased by the city, ac-

cording to law, and was perpetually enjoined from building, or preventing the complainant from connecting with the main sewer of the defendant, free of charge, and to use the same by such connection with the district sewer and laterals belonging to the complainant. A copy of the decree rendered in the Territorial Court was attached to the complainant's bill, marked Exhibit B, and is found on pages 15, 16, 17, 18 and 19 of the record.

The petition filed in the said case was referred to as Exhibit G, and was from pages 21 to 29 inclusive, as heretofore referred to, and the complainant charged that the exhibits attached to the original petition filed in the Territorial Court, were the same identically, as the exhibits A, B, and C respectively, attached to the complainant's bill in this case. (Rec. pp. 5 and 6).

It will be noticed from this decree, which appears on pages 15 to 19 inclusive, that the defendant in this case was enjoined perpetually from conducting a main sewer alongside of the main sewer of the complainant, and that the court found that the complainant was the owner and holder of the franchise and the sewer system erected thereunder. That it had sold its bonds to innocent purchasers, to raise money for the purpose of constructing said sewer; that the construction and operation of the system, by the City of Shawnee, in the immediate vicinity of the complainant's sewer, would confiscate the plaintiff's

property, and depreciate the value of the bonds thereon, and further enjoining the defendant from preventing the complainant from connecting with the main sewer of the defendant, free of charge; that is, connecting the lateral and district sewers belonging to the complainant, providing the defendant purchased the complainant's main sewer.

The complainant further charges that on the 3d day of March, 1907, that it entered into a contract with the defendant, which provided that in consideration of the Sum of Six Thousand Nine Hundred ($6,900.00) Dollars, and of the stipulations set forth therein, that the complainant sold and transferred to the defendant, all of its main line of sewer, describing it, and that the city would recognize the rights of the complainant in the laterals which were then laid in the said city, and which were of the value of Thirty Thousand ($30,000.00) Dollars; that the said contract provided that the city should be divided into sewer districts, for the purpose of laying and constructing laterals in the said districts, and that said city would cause the property of the complainant to be appraised, and the price of the same set forth, and would use all lawful means to tax up the laterals and the price agreed upon to the abutting property, and would deliver the tax warrants unto the complainant, which would be in payment of the said laterals. A copy of the contract was attached to the complain-

ant's bill, marked Exhibit E, and is found on pages 19 and 20 of the record.

This contract was made on the 3d day of March, 1907, after the decree had been rendered on the 22d day of December, 1906.

. The bill further alleges that the complainant did, on the 1st day of June, 1908, in order to comply with the terms of their contract above referred to, submit to the defendant, a proposition offering to relay and lower all of the laterals owned by it, to be the depth required by the plans and specifications as prepared by the city engineer and under his direction, and at the engineer's estimate of cost, in a good, workmanlike manner, which offer was in writing, a copy of which was marked Exhibit F and attached to the complainant's bill, and made a part thereof, which is found on page 20 of the record.

That the complainant was ready and willing, and offered to lower the said laterals, if they needed to be lowered, to repair and put into condition the conduits of the several sewer districts, and offered to, at their own expense, make the said laterals conform, in every respect, by lowering or raising them to the plans and specifications, but that the defendant refused to permit them to do so. (Rec. p. 7-8-9).

Complainant alleges that it was ready and willing to carry out the terms of its contract referred to as Exhibit E, and that the citizens of the several districts were anxious for the defendant to carry out the terms of the said contract, and to have the laterals of the

complainant appraised as provided therein, and to have the amount of such appraisal taxed to their property, and that several citizens of the several sewer districts have petitioned the defendant to do so, for the reason that the complainant offered to sell its laterals at a price considerably less expensive to the citizens and property owners, than the erection of a new or public sewer under said bond issue, but that in disregard of the said contract, the defendants refused to appraise the laterals of the complainant, or to agree with them on the price thereof, and neglected to use any lawful means to tax up the said laterals to the abutting property and deliver the tax warrants to the complainant, and refused and neglected, to in any way, buy, purchase or condemn the laterals belonging to the complainant, and refused to permit the citizens of the several sewer districts to purchase such laterals, but for the purpose of confiscating the complainant's property, and rendering it worthless and valueless, and in disregard of its contract, and the decree of the Territorial Court heretofore referred to, it had let a contract to the Newman Plumbing Company, to build laterals in the same streets and alleys alongside the laterals of the complainant, although the contract price to the said Newman Plumbing Company was far in excess and more expensive to the property owners, than the laterals of the complainant, and although such laterals were adequate to accommodate connections with the defendant's main

sewer, and that if the same was inadequate, that the complainant had offered and now offers to make them adequate. (See Rec. p. 18, par. 18).

That on or about the 1st day of June, 1908, the defendant caused its city engineer to make plans and specifications for the building of laterals in the said City of Shawnee, and in the several districts thereof, and divide the city into four districts, and required the said laterals to be constructed and laid in the said streets and alleys in conformity with the plans and specifications and in exact conformity with the laterals and sewer pipes owned by the complainant in the streets and alleys, and to be made of the same material, and placed in substantially the same places and the same depth, and that the said city engineer had filed wi h the defendant, his report, showing his plans and specifications, and that the complainant at once proposed to lower or raise, as conditions might require, its said laterals and sewer pipes, so that they would in all respects, conform with the plans and specifications of the said engineer, but that the defendants, and each of them, had refused to entertain the said proposition, and were about to make a contract with the Newman Plumbing Company, to lay the said laterals as aforesaid. (Rec. p. 89.) That the said city had ordered the said laterals to be laid alongside the pipes and laterals of the complainant, and had attempted to assess the cost of the same upon the abutting property owners, and had attempted to con-

fiscate and appropriate the system of the complainant by constructing a sewer system in the same vicinity and in the same portions of the city, and seizing the property of the complainant and charging taxes against it, for the support of the said public sewer, without authority of law, and that the same was a taking of the complainant's property, without due process of law. Complainant prayed for an injunction, enjoining the defendant from constructing within the City of Shawnee, laterals or sewer connections in the streets and alleys where the complainant's laterals were situated, and were situated on the 3d day of March, 1908, and from doing or performing anything that tended to appropriate the property of the complainant, without due process of law, or that impaired the provisions of the contract of the parties, and on the same date, the appellees entered an appearance in the Circuit Court, which appears on page 30 of the record and filed a plea to the jurisdiction of the court, which plea appears on pages 31 and 32 of the record. And to the same were attached several exhibits, which appear on pages 32-3-4-5-6-7-8-9-40-1-2-3-4-5-6-7-8-9-50-1. They also, at the same time, filed a demurrer to the bill, which appears on pages 52 and 53, and thereupon, the court, after considering the plea to the jurisdiction, entered an order which appears on page 53 of the record, finding that from the plea, as presented by the defendants, that there was a private suit pending in the state court of Pot-

tawatomie County, and ordering the application for a temporary injunction on the complainant's bill, stayed, pending the suit in the state court. Thereupon the complainant introduced dismissal of the case in the state court, which appears on page 54 of the record.

Thereafter, on application, the circuit court permitted the complainant to file an amendment to this bill, the order permitting the same being found on page 56 of the record, and the amendment will be found on pages 57 and 58. The amendment contains the allegation that there was at the commencement of the action, more than $2000.00 exclusive of interest and costs, involved in this action, and further amended the prayer asking for a temporary injunction pending the hearing, and a permanent injunction enjoining the defendants from constructing laterals or sewers and laying pipes in the streets and alleys of the city of Shawnee where the complainant's laterals and pipes were located, and from doing or performing anything that tended to appropriate the property of the complainant without due process of law, or which impaired the obligations of the contract between the parties, and also prayed for a writ of subpoena to be issued to the defendant. Subpoenaes were thereupon issued and duly served on the defendants and each of them, and thereafter, on the 20th day of August, 1908, the complainant made an application for a temporary injunction, which was a separate and distinct appli-

cation from that contained in the amendment to the bill, and on the same date, a restraining order was issued, restraining the defendant from laying pipes or laterals and sewers in the streets and alleys of the City of Shawnee, where the laterals and sewers of the complainant were located, and from taking up or in any manner interfering with the pipes, laterals or sewers of the complainant. Said order will be found on page 63 of the record.

Thereafter, on the 24th day of August, 1908, the defendants filed a general demurrer to the whole bill, which appears on pages 66 and 67 of the record, and on the 7th day of September, the court made and granted a temporary injunction in the said cause, which appears on pages 69 and 70 of the record, which order of temporary injunction was made on the condition that the complainant entered into a bond in the sum of $1000.00 to be approved by the clerk, which was done and performed by the complainant, and which bond appears on pages 70 and 71 of the record.

That thereafter, on the 19th day of October, 1908, the court sustained the demurrer submitted by the defendants, to the bill, dissolving the temporary injunction before granted, and dismissed the complainant's bill, at the complainant's cost, to which judgment and decree the complainant duly excepted. (See Rec. p. 73).

The complainant, in due time, filed a notice of ap-

peal, and its petition for an order allowing an appeal and assignment of error, which appear on pages 74, 75 and 76 of the record, and the court, in due time, entered an order allowing the appeal, which appears on page 77. An appeal bond was duly fixed and given as by law required, and the question was submitted upon the demurrer, which appears on pages 66 and 67, entitled "General Demurrer to the Whole Bill," and which was directed against the complainant's original bill and amendment thereto.

This is a case that involves the construction or application of the constitution of the United States, and the appeal is prosecuted to this court.

SPECIFICATION OF ERRORS.

The appellant assigns seven specific errors, which appear on pages 75 and 76 of the record, which are as follows:

First. The court erred in sustaining the demurrer of the appellees, to-wit: Frank P. Stearns as mayor, etc., and others.

Second. The court erred in holding that the action of the council of the said City of Shawnee, in building and constructing its own system of sewerage, and laying its mains, laterals and connections in the streets and alleys of Shawnee, which were being occupied by the Shawnee Sewerage & Drainage Company, with its laterals, mains and connections, under and by virtue of certain ordinances granting to the Shawnee Sewerage & Drainage Company the right to occupy such streets and alleys, and a certain judgment of the district court of Pottawatomie County, and a certain contract made between the said city of Shawnee and the said Shawnee Sewerage & Drainage Company, and whose property was rendered wholly worthless thereby, did not impair the obligations of the contract with the said Shawnee Sewerage &

Drainage Company, in violation of the provisions of the constitution of the United States.

Third. The said court erred in holding that the bill of the plaintiff did not state facts sufficient to entitle the plaintiff to an injunction, or to any relief in equity.

Fourth. The court erred in entering the order and decree dated October 19, 1908, sustaining the demurrer of the said defendants, and dissolving the temporary injunction theretofore issued, and dismissing at the cost of the complainant, the complainant's bill.

Fifth. The court erred in holding that the action of the municipal authorities of the City of Shawnee, in tearing up the mains and laterals of the plaintiff in error, and laying their mains and laterals therein, was not a confiscation of the property of the plaintiff, without due process of law, contrary to the provisions of the constitution of the United States.

Sixth. The court erred in not overruling the demurrer of the appellees.

Seventh. The court erred in not making said temporary injunction order perpetual, as prayed for in the plaintiff's amended bill.

These several assignments we desire to present to the court, under two subdivisions, which we will argue.

First. That the injunction entered in the Territorial court was *res judicata*, as to the rights of the parties herein, in this controversy, and that the action

of the appellees in disregarding such injunction and erecting a sewer alongside of the sewer of the appellant, and tearing up the appellant's property, was a taking of the appellant's property, without due process of law, and impairing the obligation of appellant's contracts with the city.

Second. That the contract entered into between the appellant and the appellees, on the 3rd day of March, 1907, was a valid, binding and subsisting contract between the appellant and the appellees, and the ordinance granting the franchise to complainants' assignors constituted a binding contract between them, and that the letting of a new contract to the Newman Plumbing Company, and passing an ordinance providing for the erection of a public sewer, to be owned and operated by the appellees, impaired the obligation of the appellant's said contracts and each of them.

ARGUMENT.

The appellees granted the franchise No. 228, which appears on pages 11, 12 and 13 of the record, and also the amendment thereto, which appears on pages 13 and 14 of the record, to the assignors of the appellant, under and by virtue of the laws of the state.

The statutes which were in force at the time of the granting of this franchise, will be found in Volume 1 of Wilson's Revised & Annotated Statutes of Oklahoma, 1903. Section 24, Article 3, Chapter 12, at page 234 of that publication, provides, among other things, as follows:

"The mayor and council shall have the care, management and control of the city and its finances, and shall have the power to enact, ordain, modify or repeal any and all ordinances not repugnant to the laws of the United States, and the organic act and the laws of this Territory, as they shall deem expedient and for the good government of the city, the preservation of the peace and good order, the suppression of vice or immorality, and the benefit of trade and commerce, and the health of the inhabitants thereof, and such ordinances, rules and regulations as may be necessary to carry such power into effect."

And section 25 of the second subdivision thereof, provides:

"The cities coming under the provisions of this act in their corporate capacities, are authorized and empowered to enact ordinances for the following purposes, in addition to the other powers granted by law. Second, to open, straighten and improve streets, avenues and alleys; make sidewalks and build bridges, culverts and sewers within the city; and for the purpose of paying for the same, shall have power to make assessments in the following manner, etc."

And section 54 of the same article, which appears on page 241, provides as follows:

"The council may purchase or condemn and hold for the city, within, or outside of the city limits, within five miles therefrom, all necessary lands for hospital purposes and waterworks, and erect, establish and regulate the hospitals, work houses and poor houses, and provide for the government and support of the same, and make regulations to secure the general health of the city, and to prevent and remove nuisances, and to make provisions for furnishing the city with water, etc."

And section 62 of the same act provides:

"For any purpose or purposes, mentioned in the preceding sections, the council shall have power to enact and make all necessary ordinances, rules and regulations, and they shall also, have power to enact and make all such ordinances, by-laws, rules and regulations, not inconsistent with the laws of the Territory, as may be expedient for maintaining the peace, good government, and welfare of the city, and its trade and commerce," etc.

And section 71 of the same act, which will be found on page 245 of said statute, provides as follows:

"That in cities of the first class, the city council may, by ordinance, provide for the extension or construction of laterals to main or lateral sewers constructed at the cost of the city, and shall be authorized to levy a special assessment on all lots abutting upon such sewer, and shall apportion such levy to the various lots, according to the actual cost of labor or material expended in constructing such lateral along the lot assessed, etc."

The above were the provisions of the statute, giving to the appellees the authority to grant the franchise heretofore referred to. The power to grant a franchise to build, maintain and operate a sanitary sewer, is implied from the general powers to control the streets or to protect the public health.

Charleston vs. Johnston, 170 Ill., 336; 48 N. E., 985.
Kirtland vs. Indianapolis, 142 Ind., 123; 41 N. E., 374.
Weis vs. Madison, 75 Ind., 241
Kelsey vs. King, 32 Barb., 410
Come vs. City of Hartford, 28 Conn., 363.
City of Fort Wayne vs. Coombs, 107 Ind., 75; 7 N. E., 743.
Andrews vs. National Foundry Works, 61 Fed., 782.

In the last case above cited, which was decided by the Circuit Court of Appeals for the Seventh Circuit, it is held that where a city, in addition to a grant

of general powers, was given the right to erect a waterworks system, that it possessed the power to grant a corporation a franchise to erect the same and supply the inhabitants with water. Discussing this matter the court say:

"The City of Oconto, by its own charter, had the power, and therefore, was under the duty, of caring for the public health. That power it could employ in any reasonable way; if it chose, for instance, by contracting for a water supply through pipes laid in the streets. The making of such a contract would, of necessity, carry with it the right, on the part of the contractor, to lay the pipes and to operate the plant. Such right is a franchise, and, the making of the contract operating by necessary implication as a grant of the privilege of franchise, the power given to make the contract was power to grant the franchise. But besides the power to provide for the health of its inhabitants, the city of Oconto had the express power apparently not brought to the attention of the court below, 'to provide for the erection of waterworks for the supply of water to the inhabitants of the city.' We do not agree with the suggestion of counsel that by this provision the city had no right to contract for a supply of water, and was authorized only to construct and operate a plant of its own. The authority extended to any reasonable method; and it follows, that, before the Oconto Water Company was incorporated, the City of Oconto, by its own charter, had power, from the state, to grant franchises like those in question to any person or body capable of receiving them."

There seems to be no question but what municipalities generally, have authority and general powers to provide for and protect the public health and gen-

eral welfare of the city, to enter into contracts with persons, firms or corporations, to build, erect and operate sanitary sewers, and also, as held by the Circuit Court, *supra*, it is generally held that the authority to build and maintain sewers, is construed to mean that municipalities may operate their own sewers or may contract with other persons to own and operate the same. It certainly would be a very narrow construction of these statutes above referred to, to contend that the city would have no power to provide by ordinance for the erection of such improvement.

No question was raised in the court below as to the authority of the appellees to grant the franchise, and we pass that without any considerable discussion.

After the passage of the ordinance granting to complainants' assignors, the franchise to build and erect said sewer system, and before the voting of the bonds and letting of the contract, for the public sewer, the legislature of the Territory of Oklahoma, passed a very full and complete act authorizing municipal corporations to extend or build general sewer systems, and to levy a special assessment of taxes to pay for the same. This act will be found in the Session Laws of 1903 of Oklahoma, Chapter 6, Article 1.

JURISDICTION.

The respondent presented a plea to the jurisdiction of the court, which appears on pages 30, 31 and

32 of the record, which plea was by the court duly overruled, but which question will probably be presented in this court.

That the grant of a right to supply gas or water, or to maintain a sewer in a city, through pipes and mains laid in the streets, upon the condition of the performance of the service by the grantee, is the grant of a franchise vested in the state in consideration of the performance of a public service, and after the performance by the grantee, is a contract protected by the constitution of the United States, against acts of the state legislature to impair it, seems to be well settled by a long line of authorities in this court.

City of Walla Walla vs. Walla Walla Water Co., 172 U. S., 1.
Vicksburg Water Co. vs. City of Vicksburg, 185 U. S., 65.
New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 650.

The question of the jurisdiction of the Federal Court in cases of this kind, is very fully and thoroughly discussed in the cases above cited. In the case of *Walla Walla vs. Walla Walla Water Co*, *supra*, this rule is stated in paragraph 1 of the syllabus, as follows:

"The impairment of a municipal contract for a water supply by establishing its own system of water works is not excluded from the constitutional provision against impairing the obligation of contracts, on the ground that the city makes the contract and takes

the action which impairs it in its proprietary capacity, and not as an agency of the state."

And paragraph 2 of the syllabus also states the rule as follows:

"The grant of a right to supply water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of the service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Federal Constitution against state legislation to impair it."

In this case the court will observe that the bill alleges that the appellees granted to the appellants, or their assignors, a franchise to build, maintain and operate a system of sewerage in the City of Shawnee, for a period of twenty-one years; that the appellants accepted the terms of the said franchise, and proceeded to and did build, erect and maintain said system, and that thereafter, after they had expended large sums of money, and had built and erected a sewer system, adequate to the needs and necessities of the city, that the appellees voted bonds and passed an ordinance, letting a contract to build a public sewer in the streets and alleys alongside of the property of the appellants; that said sewer was to be supported by taxation; that the property would be taxed to support the said public sewer, whether the same was patronized or not by the inhabitants; that thereupon the

appellants instituted a suit against the city, in the District Court of the Territory of Oklahoma, seeking to enjoin them from building and erecting said public sewer alongside of the sewer owned and operated by them; that in that case, the court found that the city was excluded by their franchise from building and erecting such public sewer, without first having condemned the private sewer and paid just compensation therefor, and entered a decree permanently enjoining the city from so doing. That thereafter, the appellants sold a part of their main sewer, to the city, and entered into a contract with them, in which they agreed as a part compensation for the main sewer aforesaid, that they would tax up against the property owners a tax sufficient to pay the appellants for the laterals and district sewers.

The appellants contend that this original franchise constituted a contract between it and the city; that this contract had been construed and adjudicated by the District Court of the Territory of Oklahoma, as being exclusive and prohibiting the city from building and maintaining a public sewer, and that the subsequent contract in regard to laterals, was a valid and subsisting contract, and that the letting of the contract to build a public sewer, as set out in the bill, would impair the obligations of the appellant's contract, and would appropriate and deprive them of their property, without due process of law. That this presented a federal question seems to be settled beyond question by the authorities above cited.

I.

The court will observe that the complainant charges in its bill, paragraph 10, on pages 5 and 6 of the record, that on the 6th day of November, that it commenced an action in the District Court of Pottawatomie County, to enjoin the appellees from building, constructing and maintaining said sewer system, without having first purchased the property of the complainant or compensating it therefor, and that a copy of the petition was attached to the complainant's bill, marked "Exhibit G," and made a part thereof, and that the exhibits attached to the original petition, in the district court, were the same as Exhibits A, B and C, attached to the complainant's bill in the case at bar. That the complainant further alleges and averred that on the 22d day of December, 1906, the action was duly tried in the said court, and a decree was rendered and given, adjudging and decreeing that the respondents were excluded from constructing a competing sewer, and that the operation and construction of such sewer by the respondents, in the immediate vicinity of complainant's sewer, would confiscate their property, and that they had the exclusive right as against said city, and that the said city was enjoined from building and operating a sewer system in the vicinity of the complainant's system, until after its sewer should be condemned or purchased. A copy of said decree entered in the District Court of the said Territory, was attached to the complainant's

bill, marked "Exhibit D" and is found on pages 15, 16, 17, 18 and 19 of the record.

It will be observed by a casual reading of these pleadings and the decree entered in the Territorial court, that the complainant had built a system of sewerage in the City of Shawnee, which consisted of a main sewer and certain lateral or district sewers connected thereto, which all formed one complete system, which was erected by complainants herein under and pursuant to its franchise, and the petition filed in the District Court of the Territory is in almost the same language, verbatim, as the language used in complainants' bill in this case.

In the case tried in the Territorial court, the decree was entered and the cause was presented on the main sewer, no. on the laterals, and the court there found, as shown by the decree, that the complainant's franchise was exclusive as against the city, insofar as the main sewer was concerned. If found the value of the sewer to be $6900, and enjoined the defendants permanently and perpetually from building a main sewer until they had condemned or purchased, or in some way compensated the complainants for their main sewer.

We say that the slightest reading of the pleadings in the two cases will show that they present identically the same questions and propositions. In fact, they are in the same identical language, with the exception that in the bill filed in the Circuit Court of the

United States, reference is made to the decree in the District Court of the Territory, and also to the contract made at the time that the decree was entered.

This sewer system being one general system, and as alleged in the bill, being erected and operated under one contract or franchise, the lateral or district sewers being a part of the same system of which the main sewer was a part, it is the contention of the appellants in this case, that the adjudication of the District Court of the Territory of Oklahoma, and the decree entered therein, which appears on pages 15, 16 17, 18 and 19 of the record, was *res judicata* as to the rights of the parties in the present case. The District Court of the Territory, being a court of general jurisdiction, both in law and equity, and having jurisdiction of the parties and the subject matter, adjudged and determined the rights of the parties herein, which judgment was never appealed from, but became final, and was at the time of the filing of this suit, final and in complete force and effect.

We take it to be a general principal and rule well settled, that a question of fact directly put in issue and determined by a court of competent jurisdiction, cannot be disputed in a subsequent suit between the parties or their privies, even if the second suit is for a different cause of action, if it involves the same question. For instance, it has been universally held that a judgment on an interest coupon for a bond, is conclusive as to the rights of the parties, on the bond it-

self, and this seems to be true, whether the original case was rightfully determined or not, if the court had jurisdiction of the parties and subject matter.

Southern Pacific Ry. Co., et al. vs. United States, 168 U. S., 1; 18 Sup. Ct. Rep., 18.

City of New Orleans vs. Citizens Bank of Louisiana, 167 U. S., 371; 17 Sup. Ct. Rep., 905.

Bissell vs. Spring Valley Township, 124 U. S., 225; 8 Sup. Ct. Rep., 495.

Nations vs. Johnson, 24 How., 195.

Gunter vs. Atlantic Coast Line Ry. Co., 200 U. S., 273; 26 Sup. Ct. Rep., 252.

Keech vs. Beatty, et al., 127 Cal., 177; 59 Pac. 837.

Bank of Santa Fe vs. Haskell County Bank, 51 Kan., 50; 32 Pac. 627

La Fourche vs. Terrebonne, 40 La. Ann., 1331; 22 So., 376.

This question is so thoroughly discussed in the cases in this court, above cited, that any argument upon our part would seem entirely superfluous Particularly in the case of the *Southern Pacific Railway Company vs. United States, supra*, this principle is reviewed by Mr. Justice Harlan at great length. He reviews all of the case on the question from almost all of the courts. In the third paragraph of the syllabus in that case, the court states the rule as follows:

"A decision on a question of title to lands is conclusive in a subsequent suit between the same parties in respect to other lands, when the lands in both suits have a common source of title, and the title depends

upon the existence or non-existence of a fact directly adjudicated in the former case."

This was a suit by the United States against the Southern Pacific Railway Company to quiet title to lands which had been formerly granted to a railroad company, and was alleged to have been forfeited to the government. The government contended that insofar as the question of the title to the land was concerned that it had been conclusively settled by the judgment in the case of the *United States vs. Southern Pacific Railway Company*, reported in the 146 U. S., at page 570. That in the latter case, the title to several large tracts of land having been settled and adjudicated, that it was conclusive as to the title of the land in question in that case, although it was different land, from the fact that the title to the same was derived from a common source, and adjudication as to the one, would necessarily determine the rights as to the other. The court sustained the contentions of the government, and as above stated, reviewed the authorities and discussed the principle at great length. Among other things, the court said:

"The general principle announced in numerous cases is that a right, question or fact, distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties

or their privies, be taken as conclusively established, so long as the judgment in the first suit remain unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue, and actually determined by them."

Also in the case of the *City of New Orleans vs. Citizens Bank of Louisiana, supra*, Mr. Justice White discusses this principle at considerable length. The question involved in this case was whether or not a judgment enjoining the collection of a tax against a bank for a particular year on the ground of a charter exemption, was conclusive as to the right to the exemption for future years, and the court held that it was.

And in the case of *Bissell vs. Spring Valley Township, supra*, the question recurred upon whether or not a judgment touching the validity of coupons to bonds issued in aid of a railroad company was final and conclusive, as to the rights of the parties on the bond itself, and the court held that it was.

Nor, is the rule changed by reason of the fact that the former judgment might have been erroneous. The court having jurisdiction of the parties and the

subject matter, its judgment is final whether erroneous or not, when unappealed from, and cannot be attacked collaterally.

In the case of the *Bank of Santa Fe vs. Haskell County Bank, supra,* the Supreme Court of Kansas states the rule in the syllabus as follows:

"An erroneous judgment rendered by a court having jurisdiction of the subject matter of the action, and the persons of the parties, is valid and binding until set aside or reversed."

So, in the case of *Keech vs. Beatty, et al.,* the Supreme Court of California, in paragraph 4 of the syllabus, states as follows:

"That a judgment in an action for claim and delivery may be erroneous does not render its effect as *res judicata* less binding.

Also this court in the case of *Nations, et al., vs. Johnson, et al., supra,* states the rule in the following language:

"Where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decisions be correct or otherwise, its judgment, until reversed, as a general rule, is regarded as binding in every other court."

We deem it unnecessary to multiply citations upon this matter, or to enter into a very lengthy discussion. This court has determined the question after a very full and thorough consideration of the same, in

the cases cited, and we believe we come squarely within that rule. Here is a sewer system, which consists of a main sewer and certain laterals or district sewers. They are built under a franchise granted by the City of Shawnee. A court having jurisdiction of the parties and the subject matter, a court exercising general jurisdiction in all matters, both in law and equity, decides and enters a judgment and decree finding that the city is concluded from building a main sewer alongside of the main sewer of the appellants; that the ordinances and contracts made by the city with it, excludes the city from entering into competition in building a main sewer, and enters a decree enjoining its so building, until compensation is made therefor. Under the rule stated by this court, that finding is also conclusive as to the laterals or district sewers, which are involved in this case. There being the one system, and the appellants deriving their powers and rights to build, operate and maintain that from one common source, and they both depending upon the same facts, the adjudication of the one necessarily carries with it the adjudication of the other. If the city is precluded from building a main sewer in competition with the main sewer of the appellants, they certainly would be concluded from building lateral or district sewers in competition with its lateral and district sewers.

We invite the court's attention to a reading of the decree and also of the pleadings in the former

case, and it will be found that the same questions identically, were presented and there determined.

If it be true then, that the adjudication in the Territorial court was conclusive as to these laterals and district sewers, and that a construction had been placed upon the ordinance granting the original right to the appellants, that the city was excluded from building in competition to it, their attempt to let a contract to the Newman Plumbing Company and pass an ordinance providing for the laying of lateral and district sewers alongside of their laterals, would be an impairment of the appellants' contract.

The respondent contended in the court below that as the franchise under which the appellant contended, did not upon its face, purport to be exclusive, that the city might at any time it saw fit, engage in the business of maintaining and operating a sanitary sewer in competition with its sewer. The complainant, however, contended, upon the other hand, that the franchise granted it by the respondent, was exclusive as against the city, for the reason that it had been construed by the Territorial court to be so, and the construction placed thereon became *res judicata*, and therefore, the action of the city, in attempting to let a contract to build a public sewer, would be impairing the obligations of the appellants' contract.

In the case of *Walla Walla vs. Walla Walla Water Co.*, 172 U. S., 1, the court, in discussing this proposition, said:

"The grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of the service by the grantee, is the grant of a franchise vested in the state, and after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it."

And further on, the court, in the opinion, says:

"We think, however, that it sufficiently appears, that if the city were allowed to erect and maintain competing water works the value of those of the plaintiff company would be materially impaired, if not practically destroyed. The city might fix such prices as it chose for its water, and might even furnish it free of charge to its citizens, and raise the funds for maintaining the works by a general tax. It would be under no obligation to conduct them for a profit, and the citizens would naturally take their water where they could procure it the cheapest. The plaintiff, upon the other hand, must carry on its business at a profit, or the investment becomes a total loss. * * * To require the plaintiff to aver specifically how the establishment of competing water works would injure the value of its property, or deprive it of the rent agreed by the city to be paid, is to demand that it should set forth facts of general knowledge, and within the common observation of men."

The proceeding of the City of Shawnee, to vote bonds and let a contract to build and maintain a competing public sewer, would also deprive the appellants of their property, without due process of law.

Chicago, etc., Ry. Co. vs. Chicago, 166 U. S., 226.

Garrison vs. New York City, 21 Wall., 196.
Matter of Jacobs, 98 N. Y., 98.
Pennsylvania Ry. Co. vs. Angle and wife, 41 N. J.; Eq. 316; 7 Atl., 432.
City of St. Louis vs. Dorr, — Mo., —; 41 S. W., 1094.

It is not necessary that there be a physical taking of the property for public or private use, to bring it within the meaning of the due process clause of the Fourteenth Amendment. A person may be deprived of his property, without the actual physical possession being taken from him. As was said in the matter of Jacobs, *supra*:

"The constitutional guaranty that no person shall be deprived of his property without due process of law, may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated: it is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence, any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property."

So, in the case of *Pennsylvania Railway Company vs. Angle and wife*, *supra*, the court say:

"In declaring that private property shall not be taken without recompense, that instrument secures to owners, not only the possession of property, but also those rights which render possession valuable. Whether you flood the farmer's fields so that they

cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells or noise so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense."

In this case, it is alleged in the bill that the building of a public sewer alongside of the sewer of the complainants, would render the property wholly valueless, and further alleged that as the public sewer, under the law, would be supported by taxation, and property owners would be compelled to support it whether they patronized it or not, and that it would cost them the same to patronize it as it would not to patronize it, and as a private sewer depended upon patronage for support, it would necessarily mean that its patronage would be wholly withdrawn, and as its property was underground, that it would be rendered valueless and worthless. The action of the city, therefore, ignoring its former contract, and the decree of the court, and letting the contract to build alongside of the property of the complainants, without first condemning the same or paying any compensation therefor, would be depriving it of its property without due process of law, as well as impairing the obligations of the contract between them.

II.

On the third day of March, 1907, the parties to this controversy made a contract, which appears on pages 19 and 20 of the record, and among other things the contract provided as follows:

"That the party of the second part, (that is the city) shall and will recognize the rights of the party of the first part, the owners of certain laterals now laid in the said city, and the said party of the second part shall, at the time the said city shall be districted into sewer districts, for the purpose of laying and constructing laterals in said sewer district, the said city shall cause said laterals of the said party of the first part, to be appraised, in case an agreement cannot be had for the value thereof, by the appointment of a commission, one to be selected by the city, one to be selected by the owner of the property to be affected, and one to be selected by the party of the first part, which said parties shall fix the price of the laterals, and said city shall then proceed, under any lawful means, to tax up the said laterals at the price agreed upon, to the abutting property, and deliver the tax warrants unto the said party of the first part, which shall be in full payment for said laterals, insofar as the abutting property is concerned. * * * It is further agreed that said party of the second part shall not build any new laterals up any alley in which the laterals of the party of the first part are now situated, unless said laterals as now existing, are inadequate to accommodate connections. If said laterals belonging to the said party of the first part, cannot be used for connections, on account of being too shallow in the ground, or for any other reason, then the same shall not be considered in this agreement, and the said city shall have the right to construct other laterals belonging to the said party of the second part, or to

deepen or repair the said laterals belonging to party of the first part, at its own expense, and then proceed as above set forth."

The plaintiff further alleged in its bill that its laterals, as they existed on the date of said contract, were adequate to accommodate connections with the respondent's sewer. That the respondent had wholly failed, refused and neglected to comply with any of the terms of this contract, but in direct violation thereof, was proceeding to build new laterals alongside of the complainant's laterals, although the laterals of the complainant were adequate to accommodate connections.

The complainant, in his bill, further alleged that they had submitted a proposition offering to lower or raise any laterals that were not sufficient, if any were found to be such, which offer appears on page 20 of the record.

It appears to us that a reading of the bill in connection with this contract, remembering that its allegations shall be taken as true in considering the demurrer, will convince one at once that this demurrer ought to have been overruled.

Undoubtedly the city, in the exercise of its powers over sewers at the date this last contract was made, had a right to make that contract. It seems to have been supported by a sufficient consideration, and it appears from the allegations of the bill that in disregard of its terms, that the city was proceeding to

confiscate the complainant's property. We deem it unnecessary to cite any authorities except to refer to the ones heretofore cited, and particularly to the case of *Walla Walla vs. Walla Walla Water Company, supra*, which discusses fully all of the matters presented in this assignment.

The obligations of this contract were that the city would recognize complainant's rights in these laterals. That they would use all lawful means to purchase the same, and tax up the amount thereof to the abutting property, and that they would build no new laterals in alleys where the complainants' laterals were situated. Certainly the contract to the Newman Plumbing Company, entered into by the city, together with an ordinance calling an election to vote bonds to build a public sewer, would be impairing this obligation.

The court below decided this case primarily upon the question that the grant of the franchise, and the making of the contract referred to, on behalf of the city, was an attempt to barter away the legislative power of police; that this power being one that remained constantly under the control of legislative authority, that the city council could not bind itself nor its successors, to contracts which were prejudicial to the peace, good order, health or morals of its inhabitants, but in deciding this proposition, the court wholly overlooked the material allegations of the bill in this behalf, which alleged that the said sewer sys-

tem was adequa e to meet the demands and necessities of the city of Shawnee, and all and every part thereof, and further that if it was inadequate that the complainants offered to make them adequate. Paragraph 7 of the bill, on page 4, appears the following allegations:

"And is now, and has been continuously since the said time, maintaining the said sewer system, and has met all the demands and necessities of the said city of Shawnee for sewerage purposes, and has in all respects carried out the terms and conditions of the said ordinance granting it the franchise, privileges and immunities as above stated, and has connected with the city hall, jail, fire department and public watering trough, etc."

In paragraph 8 on page 5 of the bill, appears the following:

"And so constructed the said system of sewerage adequate to all the needs, comforts and demands of the said city of Shawnee."

Also in paragraph 18, the matter is stated as follows:

"Although such laterals are now and were on the 3rd day of March, 1907, adequate to accommodate connections with the defendant's main sewer, and if the same are inadequate, your orator has offered to and now offers to make them adequate."

And parag.aph 20, is as follows:

"Your orator further shows to your Honors, that the said laterals owned by it, are as aforesaid, in

every way, adequate to accommodate connections with the defendant's main sewer; that they are in every way sufficient and adequate, but that defendant has refused to carry out the terms of the said contract and all and every part thereof, for the purpose of confiscating the property of your orator and appropriating the same, without due process of law."

There is no doubt but what if the sewer system maintained by the complainants was inadequate to meet the demands and necessities of the city of Shawnee, that the city could compel them to make the same adequate, or forfeit their franchise, but from this case it appears conclusively that this system was adequate to meet all the demands and comforts of the city.

As said by this court, in the case of *Walla Walla vs. Walla Walla Water Company, supra*:

"The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself nor its successors to contracts prejudicial to the peace, good order, health or morals of its inhabitants; but it is to cases of this class that these rulings have been confined. If a contract be objectionable in itself, upon these grounds, or if it becomes so in its execution, the municipality may, in the exercise of its police power, regulate the manner

in which it may be carried out, or may abrogate it entirely * * * Under this power and the analogous power of taxation, we should have no doubt that the city council might take such measures as were necessary or prudent to secure the purity of the water furnished under the contract of the company, the payment of its just contributions to the public burdens, and the observance of its own ordinances, respecting the manner in which the pipes and mains of the company should be laid through the streets of the city * * * But where a contract for a supply of water is innocuous in itself, and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."

This identical question was presented in the Walla Walla case, and disposed of contrary to the contentions of the appellee. Under the familiar rule that by a demurrer the respondent admits the allegations of the bill to be true, it appears in this case that this system of the complainants' sewer was amply sufficient, and was accommodating all of the necessities and demands of the city. Therefore, in the language of this court, "the aid of police power cannot be invoked to abrogate or impair it."

CONCLUSION.

In conclusion we desire to say that we confidently believe that this demurrer ought to be overruled, and the evidence taken on the plaintiff's bill. That the judgment of the Territorial court is *res judicata*, as to the rights of the parties in the laterals,

out of which this controversy arises, and that the contract referred to is valid and binding, and cannot be impaired by a resort to police power.

We have not presented any great number of cases, for the reason that the few cases that we have cited seem to decide all of the questions presented in this appeal. Particularly the case of Walla Walla seems to discuss practically all of the questions involved herein.

We therefore submit that for the reasons assigned and discussed, this cause ought to be reversed.

Respectfully submitted,

B. B. BLAKENEY AND
JAMES H. MAXEY,
Attorneys for Appellant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

THE SHAWNEE SEWERAGE AND DRAINAGE COMPANY,
Appellant,

vs.

F. P. STEARNS, AS MAYOR OF THE CITY OF SHAWNEE, ET AL.,
Appellees.

No. 109

BRIEF OF APPELLEES.

The original franchise granted to the Shawnee Sewerage and Drainage Company was not exclusive, and not being in terms exclusive, gives no rights to the company as against the right of the city to build and equip its own sewer, is shown by such an array of authorities that we need only cite the following:

Knoxville Water Company vs. Knoxville, 200 U. S., 22.

Helena Water Works Company vs. Helena, 122 Fed., 14.

195 U. S., 383; *Joplin vs. Southwest Missouri Light Co.*

191 U. S., 157; 48 L. Ed. 130; *Freeport Water Company vs. Freeport*, 180 U. S. 587; 45 L. Ed., 679.

It is also true that the impairment of the value of the appellant's plant, even its confiscation by the competition of municipal ownership will not exclude the city from the right to build its own plant. In the case above cited of the *Knoxville Water Company vs. Knoxville*, the court said:

"It may be that the erection and maintenance of gas works by the city at public expense, and in competition with the complainant, will ultimately impair if not destroy, the value of the plaintiffs' works, for the purpose for which they were established But such considerations cannot control the determination of the legal rights of parties. As was said by this court in *Curtis vs. Whitney*, 13 Wallace, 68, 'nor does every statute which affects the value of a contract, impair its obligation.'"

In the case of *Joplin vs. The Southwest Missouri Light Company, supra*, Mr Justice McKenna quotes with approval the language of Mr. Justice Peckham, in *Skaneateles Water Company vs. Skaneateles*, 184 U. S., 354; 46 L. Ed. 585, as follows:

"There is no implied contract in an ordinary grant of a franchise such as this, that the grantor will never do any act by which the value of the franchise granted

in the future may be reduced. Such a contract would be altogether too far reaching and important in its possible consequences in the way of litigation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We think none such arises from the facts detailed."

It follows from the authorities then, that impairment of value has nothing to do with the question involved. But it is insisted that the judgment in the Territorial court is *res adjudicata*, which taken in connection with the contract attempted to be entered into by the Shawnee Sewerage & Drainage Company, and the committee of the council, is binding on the city and excludes the city from extending the laterals in competition with the company.

The argument of the appellant is made under two assignments of error, first, that the injunction granted in the territorial court was *res judicata*, and second, "that the contract entered into between the appellant and the appellees on the third day of March, 1907, was a valid, binding and subsisting contract between the appellant and the appellees, and the ordinance granting the franchise to its assignors constituted a binding contract between them, and that the letting of a new contract to the Newman Plumbing Company, passing an ordinance providing for the erection of a public sewer to be owned and operated by the appellees, impaired the appellant's said contracts, and each one of them."

Answering the second argument first, we contend that as to the pretended contract set out in the record

marked Exhibit "E" (page 19 of record) that any violation upon the part of the city, even admitting that said contract was valid, which we do not concede, would raise no federal question, as there was no law of the state, or ordinance of the city, passed after said contract was made, but the said contract was made in view of the law of the state and the ordinance of the city, which had been by the decree of the court held valid and binding.

We contend however, that the contract between the Sewer Company and the Committee of the Council, upon which reliance is placed is: first, *ultra vires*, for the reason that the city was powerless under the law to enter into any such contract. The contract provides that, should the city elect to purchase the lateral sewers of the company, that it would endeavor to make an assessment against abutting property to pay for it, and the price to be fixed by arbitrators, one to be chosen by the company, one by the city, one by the owners of each lot to be assessed. This is the method provided by the contract to fix the value of the sewer, and then the city obligates itself to apportion this amount among the several lots purported to be benefited by the sewers, and tax the lot for its portion of the cost. The sewer company accepted this arrangement for its pay, and this is the only method prescribed in the contract for paying the sewer company. The question is, first, can this contract be enforced, and second, if it can, is a failure on the part

of the city to comply with the provisions thereof, a violation of any provision of the constitution or laws of the United States?

As to the first question, we submit that the contract is absolutely void and cannot be enforced, for the reason that there is no legal provision in the contract by which the sewer company can receive any pay.

Prior to the year 1907, there was no law directly providing for the construction of sewers in cities of the first class, but in the year 1897 the territorial legislature passed an Act providing that cities of the first class might provide for the construction of lateral sewers at the cost of the city, and empowered the city to levy a special assessment on all lots abutting on such sewers, and to apportion such levy to the various lots according to the actual cost of the labor and material expended in the construction of such, along the lots assessed, and further provided, that such assessments should be made and collected in the manner provided for the levying and collecting of special assessments in other cases (Session Laws 1897, Chapter 6, Article 3).

This law of course meant that the city should own the sewers. Next came the act of Congress passed in 1898, giving cities of over one thousand population, the power to vote bonds to construct sewers; this also meant, and could only mean, that the city should own the sewers. But in 1901, the mayor and council of Shawnee passed an ordinance granting to the sewer

company a franchise, or rather a license, to construct a sewer system in Shawnee. Then came the act of the territorial legislature in 1903 providing further for public and private sewers, and further provided that, when the mayor and council shall deem a district sewer necessary, they shall cause to be prepared sections, profiles and specifications for such work, together with a complete estimate, and they shall adopt any material or methods for the construction of sewers according to the plans prepared, and then shall advertise for bids and let the contract to the lowest responsible bidder, but in no case shall the contract price exceed the estimated cost submitted with the plans and specifications, and the mayor and council may reject any and all bids. It further provides that as soon as the sewers are completed the city engineer shall compute the whole cost thereof, which shall include all other expenses of the city besides the contract price for the work, and shall apportion the same against all the lots and shall report to the mayor and council who shall, thereupon levy a special tax by ordinance against the lot, and if the same be not paid, the mayor and council may issue a tax warrant against each lot. This then, is the only method provided by the legislature by which cities can make assessments against private property to pay for district sewers. The contract upon which the sewer company seeks to maintain this action further provides; that the city does not attempt to bind

itself any further than warranted and permitted by law.

Now we contend that this contract is contrary to law, hence void, and cannot be enforced. A municipal corporation cannot make any contract to assess or levy a tax on private property for public improvements, unless the power is delegated to it by the legislature, and the manner for making such assessment must be strictly followed by the city, or the levy is void.

Beach on Pub. Corp. Section 1166.

Municipal authorities cannot levy an assessment for an improvement without express legislative permission.

Vaughn vs. City of Ashland (Wis.) 37 N. W. 809.
Beach on Municipal Corporations, Section 1166.

And the language of the statute conferring the authority must be strictly construed and confined to cases already within its scope.

Beach on Corp., Section 1166.

It is a settled rule that statutes granting municipal corporations power which involves the imposition of burdens on private property are to be strictly construed; and where such statutes require the doing of some particular thing in its nature jurisdictional as a

condition precedent to the right to impose such burden, that failure to do the thing required will render the whole proceeding void.

Beach Mun. Corp. Section 1125.
Mason vs. Fearson, 9 Howard, 130.

The manner in which proceedings shall be instituted and conducted is generally specifically provided by charter or statute, and courts are strict in enforcing all legal provisions thereof.

McQuillan Munc. Corp., page 829;
Gray vs. Burr (Cal.) 70 Pacific, 1068.

A contract made by a municipal corporation in contravention of express law, is void, and the corporation cannot be held liable therefor.

Vol. 1, Beach Public Corp. Sections 217-244;
County of Davis vs. Dickinson, 117 U. S. 657.

Unless the Act of the territorial legislature, passed in 1903 impairs the obligation of the contract or franchise granted by the city to the sewer company of 1901 to construct a sewer system in Shawnee, this court has no jurisdiction. Anything that the city might do tending to impair or repudiate its contract with the sewer company, unless it was done after and by virtue of a law passed by the legislature, would not be a violation of Section 10, Article 1, of the Constitution of the

United States, providing that no state shall pass any law impairing the obligation of contracts.

Neither the territorial nor state legislature has passed any law impairing any obligation of the sewer contract between the company and the city, and if the city has done, or is doing anything to impair that obligation, redress should be sought in the state courts. Now can the sewer company say that the city should not be allowed to construct lateral sewers in the vicinity of its lateral sewers for the reason that, at the time the city passed the ordinance granting to it the privilege of constructing a sewer system, to-wit: 1901, there were two acts, one by the legislature of the territory, and one by congress, both of which gave cities power to vote bonds for the construction of sewers, to be owned by the city.

These laws were in force at the time the city granted to the sewer company the right to construct its sewer. The sewer company accepted this grant from the city with full knowledge of the existence of these laws, and knew that under these laws, the city had the right, whenever it deemed it necessary for the preservation of the health of the inhabitants of the city to construct a system of sewers of its own.

With this reserved power to cities to construct and own sewers, in the statutes of both the United States and the territory of Oklahoma, the city, whenever it deemed it necessary, could construct a sewer system of its own, and in so doing, would not impair the obliga-

tion of the contract it had with the sewer company even though the property of the company would be rendered worthless. Nor can a city bind itself by any contract divesting or abridging its full control to do anything for the protection of the public health, and nothing will protect the public health of a city more effectually, than sanitary sewers.

National Water Works Company vs. City of Kansas, 28 Fed., 921;
Butchers Union. Cons. vs. Crescent City Company, 4th S. C. R., 658.

Nor can a city grant to a corporation an exclusive franchise without express authority from the legislature, even where no express prohibition is found in its charter or statutes.

McQuillan Munc. Ordinances, Section 190;
Greenville Water Works Company vs. City of Greenville, 4th So. Rep 409.

The power of municipal corporations are limited by the express terms of the grant, and will not be extended by inference. They can confer exclusive privileges only under an express grant of power from the legislature.

But coming to the first assignment of error, and the contention raised by appellant that the decision of the territorial court, was *res judicata*. What was the object of the suit in the territorial court? An examination of the petition will show that it was a suit to

declare the bond election illegal, and the ordinance directing it illegal, not because it impaired the obligation of their contract under a law of the state, but for certain defects in the ordinance itself; and further to enjoin the issuance of the bonds, and from "doing any act or thing tending to depreciate the properties of said plaintiff," and from "doing or performing any act or thing towards the construction of any sewerage system in the said city of Shawnee under city ownership and control."

When the decree was made, instead of declaring the ordinance invalid, the court declared it valid; instead of declaring the election invalid, the court declared it valid; instead of enjoining the issue of the bonds, the court validated them; and the only finding of fact in favor of the company was that, it

"had a legal franchise for carrying on the business of operating a sewer system in the city of Shawnee, and that the construction and operation of a sewer system in the City of Shawnee in the immediate vicinity of said sewer would confiscate the plaintiff's property and depreciate the value of the bonds thereon."

And said decree provided that: "It is further adjudged and decreed that the mayor and councilmen of the City of Shawnee, be and they are hereby enjoined from building or providing a sewerage system in the vicinity of the plaintiff. said sewer main as herein described until after plaintiff's said sewer main shall be condemned or purchased by the City of Shawnee." (Record p. 45).

It is admitted in appellant's brief (p. 10), that

thereafter, the appellant sold its main sewer to the city, so it will be seen that the city was only enjoined from "building or providing a sewerage system in the vicinity of the plaintiff's said sewer main." "until after plaintiff's said sewer main shall be condemned or purchased by the city."

The question as to the right of the city to construct the lateral sewers was not litigated or determined in that action.

A former judgment is not conclusive in another action between the same parties upon a different claim or demand, except, as to the point or question actually litigated and determined in the former action.

Roberts vs. The Northern Pacific Railroad Company, 158 U. S. 1, 29 Law. Ed. 873.
Cromwell vs. Sac. County, 94 U. S. 352.

In the above case of *Roberts vs. The Northern Pacific Railroad*, Mr. Justice Shiras in delivering the opinion of this court quoted with approval the language of this court in the above case of *Cromwell vs. Sac.* County, as follows:

"This distinction was clearly recognized in the case of *Cromwell vs. Sac. County*, 94 U. S. 352. That was a case where there was brought into question the effect, as between the same parties, of a former judgment holding invalid coupons taken from the same bond with those in a second suit, and it was there said: 'In considering the operation of this judgment it should be borne in mind that there is a difference between the effect of a judgment as a bar or estoppel against the

prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon its merits, constitutes an absolute bar to subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for examp'e, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and of the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

'But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases therefore, where it sought to apply the estoppel of a judgment rendered upon one

cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not as to what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action The difference in the operation of a judgment in the two classes of judgments mentioned is seen through all the leading adjudications upon the doctrine of estoppel.

'The cases usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined.' 'It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action. Various considerations, other than the actual merits may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction.'

And said:

"It was accordingly held in that case that a party plaintiff who had been defeated in one action upon coupons cut from county bonds because he failed to show that he was a bona fide holder for value, was not precluded from showing, in a subsequent action brought to recover on other coupons cut from the same bonds, that he was such bona fide holder for value of such other coupons."

The injunction in the territorial court went only to two matters, first, "the mayor and councilmen of the City of Shawnee be and they are hereby enjoined from building or providing a sewer system in the vicinity of the plaintiff's said sewer main, as herein described, until after plaintiff's said sewer main shall be condemned or purchased by the City of Shawnee;" and second, they were enjoined from "preventing the said plaintiff from connecting with main sewer free of charge, and to use the same by such connections, all the district sewers and laterals belonging to the plaintiff in operation within said city at the date of the rendition of this judgment."

It is alleged in the bill and admitted in appellant's brief (p. 10) that on March 3, 1907, the city purchased the main sewer of the appellant company at the sum of Six Thousand Nine Hundred Dollars; by the very language of the injunction in the Territorial Court this purchase terminated the operation of the same, and the city was no longer bound thereby.

The city could not divest itself of the power to provide for the protection of the lives, health, and property of the citizens, and the preservation of good order and public morals. All rights, including those under charters, are held subject to the police power of the state.

C. B. & Q. Ry. vs. Omaha, 170 U. S., 57; 18 S. C. R. 513;
Stone vs. Mississippi, 101 U. S., 814; 25 L. Ed. 1079;
Boston Beer Co. vs. Mississippi, 97 U. S., 25; 24 L. Ed. 989;
Butcher's Union Company vs. Crescent City Co. 111 U. S., 746;
City of Portland vs. Myers, 52 Pac., 21; 28 Fed. 921, *supra.*

In the case last above cited the City of Kansas City had granted to the Water Works Company under a law which admittedly gave them the power to do so, the right to lay water mains in the street for a system of water works. Afterwards the city in establishing a system of sewers, compelled the water company to relay its water pipes at its own expense, and the water company brought suit against the city for the cost of such removal, and the defendant city set up the contention—"that it could not, if it would, and it did not if it could, contract to waive the right to construct sewers in any part of the public streets it might deem necessary; and that the plaintiff took its contract right to lay its pipe in the public streets subject to the para-

mount and inalienable right of the city to construct its sewers wherever therein, in its judgment, the public interests demanded."

In passing on this contention, Mr Justice Brewer said:

"I think the contention of the city is correct, Sewerage is a matter unquestionably affecting largely the public health, and no municipality can make a contract divesting or abridging its full control over such matters."

The judgment of the circuit sustaining the demurrer to the bill should be sustained.

Respectfully submitted,

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